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In The

Supreme Court of the United States

October Term, 1979

No. 79-1127

VINCENT and BARBARA LIBERTI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GEORGE DAVID ROSENBAUM
Attorney for Petitioners
51 Chambers Street
New York, New York 10007
(212) 233-8120

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The petitioner, Vincent and Barbara Liberti respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 25, 1980.

OPINIONS BELOW

The opinions of the District Court, decided January 3, 1979 and of the Court of Appeals for the Second Circuit, decided January 25, 1980 appear in the Appendix attached hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 25, 1980 and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1) and Rule 22(2) of the Rules of the Supreme Court.

QUESTIONS PRESENTED

1. Do the police usurp the function of a magistrate when they, prior to the application for a search warrant, make a unilateral determination as to where probable cause exists, and upon making that determination, present only that limited amount of evidence to the magistrate?

2. Can the seizure of evidence be validated under the "plain-view" exception where the police seize items, not contraband in and among themselves, and which the police had probable cause to believe would be within the area searched?

3. Does the Fourth Amendment allow a procedure where the police may conduct a full-scale search of an individual's home even though the warrant procured was only for a limited purpose?

4. Is there a voluntary consent when an individual is presented with a court order and instructed that their consent is unnecessary?

CITATIONS

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Constitutional Provisions Cited:

Fourth Amendment

Statutes Cited:

Title 18, United States Code, Section 1341 1

Rules Cited:

Federal Rules of Criminal Procedure, 41(c).

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES OF AMERICA, FOURTH AMENDMENT:

AMENDMENT IV-SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issued, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE
PRELIMINARY STATEMENT

On January 25, 1980, the Court Appeals for the Second Circuit reversed the finding of the United States District Court for the Southern District of New York. That opinion, dated January 3, 1979 and affirmed upon reargument on March 1, 1979 had held that property seized pursuant to a search warrant, issued July 10, 1978 be suppressed and excluded from use as evidence against the defendants in any criminal proceeding. The jurisdiction of the District Court had been invoked under 18 USC 1341.

As indicated, on July 10, 1978, a search warrant was issued by Magistrate Leonard Bernikow, pursuant to an application by the government, to search for and seize "one brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee

Lauder cosmetic gift boxes"[1] The warrant was executed on the day it was issued and pursuant to it, large quantities of cosmetics, tote bags and other items were seized from various portions of the Liberti household. The brown box described in the search warrant was never found. (TR31).

That appellants then moved in the United States District Court, for the Southern District of New York on August 1, 1978 for an order directing a return of the property seized and further, for an order directing that the use of the property as evidence be suppressed.

A hearing was held and the District Court, per Broderick, J. granted the appellants motion to suppress. On January 19, 1979 the government moved for reargument. Reargument was granted,

1. The warrant and the application appear in the Appendix at page 1.

but on March 1, 1979, the Judge adhered to his prior ruling. The government then appealed, pursuant to 18 U.S.C. 3731, to the Court of Appeals for the Second Circuit. In a decision dated January 25, 1980, the Court, per Judge Van Graafeiland reversed the decision of the District Court. Upon the belief that the action by the Court of Appeals conflicts with established precedent as well as the Constitution and Statutes of the United States, the appellants herein pray that a writ of certiorai be issued to review the finding of the Court of Appeals.

FACTS

A. THE INVESTIGATION AND WARRANT APPLICATION

Concerned with the possibility that employees in the delivery department of Saks Fifth Avenue Department Store were mailing out unpurchased merchandise to their homes, United States Postal Inspectors conducted an investigation into this situation.

Postal Inspector James J. Boyle proceeded to interview James Burger and Paul Bendorias, security personnel employed by Saks. According to Boyle's testimony at the hearing of August 7, 1978, they informed him that Mr. Liberti and others in the mail department had been under investigation for some time. (TR 21, 22).

Boyle also testified that through conversations with these Saks employees, he was aware of at least two mailings from Saks employees to the Liberti's home during that period of June 12 through July 23, 1978. (TR 12, 13).

Boyle further testified that Bendorias and Burger informed him that they believed that Mr. Liberti had sent other packages containing "various merchandise" to his home addressed to his wife. (TR 12, 22).

The first of the two mailings

known by Inspector Boyle occurred on June 23, 1978 (TR 13, 14). Boyle had a substanial amount of information regarding this mailing. He knew that it was a size 36C box (TR 230) and was hand addressed to Mrs. Barbara Liberti at 2029 Hering Avenue, Bronx, New York. (TR 230). Although Boyle was unsure of the exact contents of this box, he testified that pictures of parcels prepared for mailing at Saks had been photographed by Bendorias on June 21, 1978. (TR 33,34).

Boyle testified that in his conversations with Bendorias he learned that the suspect parcels were not only photographed, but were also marked for identification and that one of the parcels so identified was sent to the Liberti home (TR 34-6). These conversations formed the basis of Boyle's affidavit in support of the search warrant for the June 29, 1978 parcel (App 4) and, appel-

lant submits, would have provided a sound basis for issuance of a search warrant for the June 23, 1978 parcel as well.

Bendorias, although a key man in the government's investigation and subsequent application for the search warrant, did not testify at the evidentiary hearing even though the affidavit submitted by Boyle to Magistrate Bernikow indicated that Bendorias had personally observed a number of "brown cardboard boxes" being prepared for mailing in the Saks delivery department. In addition, Bendorias had even opened some of the parcels and found in them "clothes, cosmetics, and other property and merchandise belonging to Saks Fifth Avenue." (See Affidavit of Boyle. App 4).

Even without Bendorias' testimony, the totality of the circumstances clearly indicates that the government knew

that more than the June 29, 1978 parcel would be found at the Liberti residence. Boyle, from his investigation, knew that other mailings had taken place. In fact, on July 6, 1978 Boyle had interviewed another Saks mailroom employee, Rudolph King, and from this interview learned that parcels had been suspiciously mailed to the Liberti home for over a year.[2] (TR 31-2).

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2. The record could not be clearer:

Q: (Rosenbaum, Atty.) Other parcel officials told you that between June 12th and July--what did they tell you?

A: (Boyle) They said other deliveries had been made.

Q: So you had reason to believe that when the search was made other merchandise would be found there, is that correct?

A: I assumed that, yes.

Q: And you didn't make a request in your search for that, did you?

A: No, I didn't (TR 50-51).

B. THE WARRANT

The application for the warrant was supported by the affidavit of Inspector Boyle and was based largely upon information supplied by Paul Bendorias and postal authorities.[3]

The application was carefully worded and made no reference to the June 23, 1978 parcel or to any conversation with Mr. King, Mr. Bendorias or the postal authorities regarding other parcels mailed prior to, or during, the government's investigation. Essentially the government only applied for a warrant to search for the June 29, 1978 parcel.[4]

3. Appendix page 3.
4. Inspector Boyle testifed over objection that he believed the June 29th parcel "would be the only one that would be readily available". (TR7). Attorney Pomerantz indicated in his redirect examination of Boyle that the information they had was "too stale for a search warrant to issue". (TR-38). In contrast, the government's brief on appeal(atp.6) would have the court to accept the fact that there was "insufficient information to support a search for the June 23, box or any other prior shipment".

The application was totally barren as to whether or not the authorities believed other Saks merchandise would be in existence at the Liberti residence.

Magistrate Bernikow was satisfied that probable cause existed as to the June 29, 1978 parcel and authorized a limited search by James Boyle or any other authorized Federal Officer or agent for:

> One (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violation of Title 18, United States Code, Section 1341.[5]

C. EXECUTION OF THE WARRANT

Boyle himself did not aid in the execution of the warrant. The execution was entrusted to a team of government agents comprised of three postal inspectors (O'Brien, Shorr and Cassidy) and

5. 18 U.S.C. 1341 makes it a crime to use the Post Office to obtain money or property by false or fraudulent means.

an employee of Saks who was familiar with the investigation (Burger). Inspector O'Brien was the leader of the search team and Burger's presence was solely to determine whether any items inadvertently found were actually Saks merchandise.

Boyle admitted on cross-exaimination that prior to the actual search of the premises, he instructed Burger to seize whatever items were not properly in the residence (TR 28).

He further testified that he knew that there was no authority for these broad instruction and that the warrant limited the search to "one brown box". Admittedly, he gave these instructions to O'Brien because it was his belief that other items of a suspicious nature would be found. (TR 28-9). It goes without saying that this belief was the culmination of his weeks of investigation.

As to the other members of the search team, both Cassidy and Shorr testified that they discussed amongst themselves and with Burger the investigation in general as well as the action to be taken with respect to the limited nature of the search warrant. (TR-144-6, 115-6). This conversation, which occurred in the automobile used to transport the agents to the Liberti home, is another indicator of the extent of the investigators suspicions.

The search team arrived at the Liberti residence at approximately 3:30 P.M. on July 10th. (TR 56, 119). They were met at the door by the Liberti's son who indicated that only his grandmother, Mrs. Conacchio, was home. Mrs. Conacchio, after being informed of the team's purpose, refused them admittance to the home, and the search team waited outside.

Mrs. Liberti arrived home approximately 4:00 P.M. and was intercepted at the steps of the house. O'Brien identified himself, explained their purpose, and delivered to Mrs. Liberti a copy of the search warrant. (TR 57). Mrs. Liberti inquired of O'Brien as to what they were searching for and O'Brien responded "a brown box containing Estee Lauder cosmetics." (TR-58). At hearing this, Mrs. Liberti refused the search team admittance. O'Brien indicated that the warrant was a court order which did not require her consent. Hearing that, she fearfully admitted them to her home.

Inside the home, Mrs. Liberti, in response to questions by members of the search team went to a closet in the hallway, opened it and stated "This is all I have." O'Brien, on cross-examination, testified that inside the closet, on an upper level shelf, he observed several

stacks of "thin white boxes." (TR 89-90). The boxes had no markings on them to indicate that they were cosmetics belonging to Saks or that they were sold exclusively by Saks. However, on the advice of Burger that they were indeed Saks merchandise, the goods were seized. (TR 59, 97).

During the search, the inspectors and Burger continued to indiscriminately and actively search through the Liberti home and seize any and all items which in Burger's estimation were Sake merchandise (TR 64-5, 89-90, 118-9, 130-1) and which were believed to be "evidence of a crime".

The search extended into areas where a box with the dimensions of the one described in the warrant (18" x 24" x 14") could clearly not fit. That is,

the searchers looked in a number of drawers, underneath the couch, a table, a kitchen sink and inside a breakfront. (TR 70, 108, 117).

While hundreds of items were seized, including other cosmetics, a blue nylon bag, and a brown tote bag, (all items not carried by Saks), the box described in the search warrant was never found.

POINT I

THE DECISION BELOW CONFLICTS WITH THE FOURTH AMENDMENT AS WELL AS RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AS IT USURPS THE AUTHORITY THAT A MAGISTRATE DETERMINE WHETHER OR NOT PROBABLE CAUSE EXISTS FOR ISSUANCE OF A SEARCH WARRANT.

Overruling the opinion of the District Court, the Court of Appeals held that "police officers applying for search warrants are not required to provide a magistrate with all the information in their possession. Opinion of Court of Appeals, No. 79-1127, pg. 5937.[1] Plaintiff submits, that while this may be the correct rule (See United States v. Charlton, 409 F.Supp. 1327, 1330-1 (E.D. Tenn. 1975), aff'd 565 F. 2d 86 (6th Cir. 1977 cert. denied sub. nom.). The Court of Appeals erred in its interpretation of this rule.

1. The full text of the opinion of the Court of Appeals is set out in the Appendix at pg. 41

The district court perceived the issue to be whether or not the magistrate is able to make "the relevant determination as to probable cause or whether the government had in effect usurped this power by 'unilaterally making a prior determination that probable cause existed as to only the June 29, 1978 package, and by so determining preclud(ing) a full and fair hearing of probable cause.'" Matter of 2029 Hering St., Bronx, New York, 404 F. Supp. 164 at 170 (SDNY, 1979).[2]

To effectuate the safeguards of the Fourth Amendment, Rule 41 requires that a search warrant be issued by a detached and neutral magistrate,

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2. The full text of this opinion is set out in the Appendix, pg. 5

Coolidge v. New Hampshire, 403 U.S. 443 (1971) and further, that it is up to the magistrate to determine whether or not probable cause exists so as to permit the issuance of a search warrant. (FRCP, Rule 41(c)); Aguilar v. Texas, 378 U.S. 108 (1963).

The classic statement of the constitutional necessity that a magistrate determine whether or not a search warrant shall be issued is embodied in the case of Johnson v. U.S., 333 U.S. 10 at p.13-14 (1947).

In that case the Supreme Court held:

> Its (Fourth Amendment) protection consist in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise ferreting out crime. Any assumption that evidence sufficient to support

> a magistrate's disinterested determination to issue a search warrant will justify the officer in making the search without a warrant would reduce the amendment to a nullity and leave the people's homes secure only in a discretion of police officers... when the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

It is patently obvious that if the decision as to what information must be submitted to a magistrate be granted to the police officers charged with "ferreting out crime", the result will be that it is the police officer, not the magistrate who would effectively determine the validity and breadth of search warrants. The prime focus of the rule expressed in Johnson is that:

> Prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to

> their own investigations, Coolidge v. New Hampshire, 403, U.S. at page 450.

For this Court to concur in the holding of the Court of Appeals below would effectively vitiate the dual constitutional protections afforded by the Fourth Amendment and Rule 41. These protections are that there will be no intrusion upon a person, his home or effects without a careful, prior determination that such an intrusion is necessary, and if such is the case, the scope of that search is limited by a magistrate and would not involve an "exploratory rummaging in a person's belongings". Coolidge v. New Hampshire, Supra. 403 U.S. at 467. The holding of the District Court below was:

> Police must be without probable cause to believe evidence would be discovered

> provided that the police have tended to a detached and neutral magistrate all evidence and information in their possession so that, prior to the search, the magistrate would have been able to make the relevant determination as to probable cause.[3]

In essence, the District Court found that the law enforcement officers acted in a cavalier manner and circumscribed the Fourth Amendment safeguard. The Appellant submits that the District Court was requiring that the law enforcement officials tender to the magistrate enough information to allow him to make a relevant determination as to probable cause. This does not mean the law officials must empty their files on the magistrate's desk, but rather that information pertaining to the same type of criminal conduct be disclosed. Armed

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3. Memorandum Order of March 1, 1979 App. p.39

with this information, the magistrate will then be able to carry out his constitutional duty.[4]

To support its criticism of the District Court's holding, the government, in its brief to the Court of Appeals relies upon the recently decided case of U.S. v. Hare, 589 F.2d, 1291 (1979). The Defendant in Hare had been under investigation by both the Bureau of Alcohol, Tobacco and Firearms and by the Drug Enforcement Administration. The search warrant ultimately obtained authorized the search of the Defendant's home for

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4. It is readily apparent that there is no distinction between a warrant whose parameters are determined by the police and a warrant of the type invalidated by Coolidge. (It was signed by the New Hampshire Attorney General, who was later the Chief Prosecutor). In fact, the Court invalidated that search on a "per se rule of disqualification" Coolidge v. New Hampshire, 403 U.S. at 450.

firearms. During the search, narcotics were found and their seizure upheld by the Court of Appeals for the Sixth Circuit. The Court held that the seizures were inadvertent because the police were without probable cause to believe the evidence (narcotics) would be discovered until they actually observed it in the course in an otherwise justified search. Dealing with the issue of "inadvertence" the Hare court further held that:

> There are many times when a police officer may "expect" to find evidence in a particular place and that expectation may range from a weak hunch to a strong suspicion. U.S. v. Hare, 589 F.2d at 1294.

Appellant submits that Hare is distinguishable from the instant case and for the Court of Appeals for the Second Circuit to apply that holding to the facts of this case violates the principles

of "inadvertence" as defined in Coolidge v. New Hampshire.

Hare is distinguishable from the instant case on two specific points. As indicated, the police in Hare were looking for firearms and had no probable cause to believe that narcotics would be present. However when they did inadvertently discover the narcotics, their seizure was proper. In the instant case, the District Court clearly found that the police officers had probable cause to believe that cosmetics would be present in the Liberti household. In addition, only cosmetics were found. There was no inadvertent discovery of other contraband or fruits of a non-related crime. Thus there is no dichotomy as to the type of property initially authorized by the search and the type of property

"inadvertently" discovered.

Appellant submits that the holding of the Court of Appeals effectively reduces and diminishes the function of the magistrate to that of a rubber stamp for the actions of the police. In the case of U.S. v. Freeman, 358 F. 2d, 459 (2nd Circuit 1966) the court stated:

> Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform a neutral and detached function and not serve merely as a rubber stamp for the police. Aguilar v. Texas, 378 U.S. 108 (1964), See Johnson v. U.S. 333 U.S. 10 (1947).

The Ninth Circuit in the case of U.S. v. Anderson, 453 F. 2d 174 (Ninth Circuit 1971) has reached similar results. In that case, the court held that both the Fourth Amendment and Rule 41(c) of the Federal Rules of Criminal Procedure

demand "that all facts establishing probable cause be presented to the federal warrant-issuing official so that he may adequately perform his impartial function of determining probable cause upon a consideration of all the facts." U.S. v. Anderson, 453 F.2d at page 176. Citing Giordenello v. U.S. 357, U.S. 480 (1958).

Moreover, the Second Circuit has recognized that it is the magistrate's responsibility to consider all of the facts. U.S. v. Dunnings, 425 F.2d 836 (2nd Circuit, 1969).

It is clear therefore, that the decision and order of the Court of Appeals diminishes the Fourth Amendment and reduces the function of the magistrate to a mere rubber stamp of the actions of the police. In short, this condones and

supports the evolution of a new procedure relevant to search warrants wherein the police obtain a search warrant of minimal proportions and then, utilizing that search warrant, execute a general search under the guise and protection of the "inadvertence" doctrine of Coolidge v. New Hampshire. Appellant submits that this over-expansive action and degradation of the Fourth Amendment should not be condoned or encouraged.

POINT II

THE DECISION BELOW HAS ERRONEOUSLY EXPANDED THE PLAIN-VIEW EXCEPTION AS ENUNCIATED IN COOLIDGE V. NEW HAMPSHIRE TO INCLUDE AND VALIDATE A GENERAL SEARCH OF AN INDIVIDUAL'S HOME.

Initiating its discussion, the Court of Appeals indicates that while there has been "no unaminity of opinion as to what this portion (the inadvertence requirement) of Coolidge really stands for" most courts have accepted that Coolidge added the concept of inadvertence to the traditional doctrine of "plain view". United States v. Griffith, 537 F.2d 900 (7th Cir. 1976); See United States v. Santana, 485 F.2d 365, 369 8 (2d Cir. 1973), Cert. den. 415 U.S. 931 (1974).

Under Coolidge, the "plain view" exception applies only to situations in which a government agent (1) with

a prior justification for an intrusion (2) inadvertently discovers a piece of evidence that incriminates the accused. Matter of 2029 Hering Street, Bronx, New York 464 F.Supp. at 168.[1]

In discussing the inadvertence requirement, the Coolidge court indicated that where:

> The discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is all together different. The requirement of a warrant imposes no inconvenience whatsoever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances" If the initial intrusion is bottomed upon a warrant that fails to mention a particularized object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrant... particularly describing... (the) thing to be seized."...(T)o extend the scope of such an intrustion to the seizure of objects - not contraband nor stolen nor dangerous in themselves-which the police know in advance they find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure (emphasis original) Coolidge v. New Hampshire, 403 U.S. 443 at 470-71.

Examining the above guided section, the Coolidge Court did not state that the seizure was inadvertent only if there was no probable cause to believe other evidence would be found at the premises to be searched. Instead, the Coolidge Court uses the words "anticipated" and "know in advance". The Court of Appeals below felt that the seizure was inadvertent if there was no probable cause. This is a different standard than announced in Coolidge.

In discussing this, very point, the Hare court stated:

1. Appendix page 15

> The line between suspicion and probable cause is seldom very clear. It makes sense, however, if the fact is kept in mind that a warrant is normally required before a search can be conducted or a seizure effectuated... U.S. v. Hare, 589 F.2d 1291 at page 1295 (1979)

In addition, the Court of Appeals decision was based on findings of facts in conflict to those determined by the District Court. The function of the trial court is to act as the fact finder and the Court of Appeals when reviewing the determination(s) of a distinct judge sitting without a jury may be set aside an appeal only "if clearly erroneous and that a reviewing court must not weigh the evidence de novo or disturb the finding(s) simply because it might have reached a contrary result on the same evidence. Daniels v. Hardly Memorial Hospital, 566 F.2d 749 at 756 (1977).

The District Court determined

that the items seized at the Liberti home were not inadvertently stumbled upon.

Postal Inspector Boyle knew that various packages had been mailed to the Liberti home from Saks for a period of approximately one year. At the hearing, testimony was elicited that he believed, not merely suspected, that items other than the on brown box specified in the warrant and in particular, the June 23 box, would be found. As stated, he ordered the other inspectors, O'Brien, Schorr and Cassidy to seize all such items when they were discovered.[2]

One of the inspectors, Schorr, went to the Liberti home intending to seize any and all cosmetics he could find.[3]

2. Transcript, page 28
3. Transcript, page 115.

The trial court correctly found that at the Liberti home "he was engaged in a general search for cosmetics" Matter of 2029 Hering Street, 464 F.Supp. at 168.[4] So engaged, it was quite conceivable from the outset, indeed even probable that the Inspectors would discover Saks merchandise at the Liberti residence as Mr. Liberti had been employed by Saks Fifth Avenue for a period in excess of thirty years and that during that time, he like most employees, purchased goods from the store.

Furthermore, the District Court found that the presence of James Burger, a Saks agent substantiated the claims that the discovery of evidence was not inadvertent, but anticipated. He was present in order to be able to identify any other Saks goods that were discovered.

4. See Appendix page 18

His presence was not required as the property specified in the search warrant was sent to the applicant's residence in a readily identifiable package and the contents of the package had been previously photographed. Matter of 2029 Hering Street, supra page 169.[5]

As further proof that probable cause existed, in route to the Liberti house, the entire search party discussed the planned operation and agreed to seize anything identified by the Saks agent that might have been sold at Saks. The search itself also indicates probable cause existed. The Inspectors rummaged for over an hour through areas where it was apparent that the items mentioned in the search warrant, i.e. "one brown box" could not be secreted. For example, Inspector Schorr looked for the box under a couch

5. Appendix page 18

and in an open cabinet breakfront.[6] O'Brien searched for the box inside a drawer and in the course of his search, seized a tote bag.[7] The Inspectors also seized numerous unmarked or blank boxes which bore no identification of Saks merchandise.[8]

The government, in its appeal to the Court of Appeals sought to ignore the broad scope of the executing officials search because no property was found in the areas above described. Conceptually, it is unlikely that a successful argument could have been made that the goods seized from those areas were inadvertently discovered or properly seized. By so dividing the search into two parts, the government seeks to focus this Courts attention to only those areas where the

6. Transcript page 117.
7. Transcript page 73.
8. Transcript page 89, 149

inadvertence standard of Coolidge could be applied. In doing so, it has caused the Court of Appeals to overlook the District Courts finding that this search was indeed general in nature.

The instant case falls squarely within these rules. The Postal Inspector had probable cause to believe that the seized items would be in the Liberti home and their assertions that they did not know specifically what items would be found does not dimish the applicability of the District Court's finding of probable cause.

In addition, the Postal Inspector, by carefully circumscribing the evidence presented to the Magistrate prevented the Magistrate from making the constitutionally required determination as to whether or not probable cause existed to the property that could only be generic1y described.

Clearly, the Court of Appeals' reliance on the Hare decision is misplaced as that case is readily distinguishable. In Hare, as previously mentioned, there were two distinct crimes and two distinct types of contraband involved; firearms and narcotics. (See U.S. v. Hare 589 F.2d 1291 (1979). The fact that the police were only able to obtain a search warrant relevant to the firearms did not prevent their seizure of the narcotics which were discovered both inadvertently and were in plain view. In the instant case, the Liberti's are only charged with one type of criminal conduct, i.e. mail fraud and there is only one category of property involved, i.e. cosmetics. Furthermore, cosmetics are clearly not the type of property which can categorically be deemed contraband or even dangerous. See U.S. v. Canestra 518 F.2d 269. Its strains

credibility to believe that where the defendant is charged with mail fraud involving Saks merchandise and an investigation shows that property has been mailed to or premises on more than one occasion, there has been an inadvertent discovery of different crimes when the subsequent search turns up additional Saks merchandise or other cosmetics. In essence, the procedure urged by the Government and adopted by the Court of Appeals, resurrects and validates the general warrant.

POINT III

THE DECISION BELOW CONDONES AND ENCOURAGES LAW ENFORCEMENT OFFICIALS TO LIMIT IN BAD FAITH THEIR PRESENTATION TO THE MAGISTRATE, AND TO EXECUTE A WARRANT SUBSEQUENTLY ISSUED IN A BROAD AND OVERRULING MANNER.

The opinion of the District Court below indicated that the procedures used to obtain and execute a search warrant in this case constituted "the next logical step in the attempted circumvention of the warrant requirement..."[1]

The Court of Appeals, while recognizing that there presently exists doubt as to the continued viability of the inadvertence doctrine, nevertheless upheld the search and seizure. Opinion of Court of Appeals, No. 79-1127, at 5934.

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1. Appendix p.49

Citing U.S. v. Santana, 485 F.2d 365, 369 n.8 (2nd Cir. 1973), cert. denied 415 U.S. 931 (1974).

Law enforcement officials should not be permitted to circumscribe the presentation of evidence to a magistrate so as to obtain a search warrant that allows entrance to an individual's home and, upon obtaining access, seize items whose existence was deliberately withheld from the magistrate.

Based on the Court of Appeals' probable cause test for inadvertence, all items sought by the police can be seized because there is either probable cause to search or the items can be seized pursuant to the authority of Coolidge. The result is that individual rights under the Fourth Amendment are nullified.

The result of this contradiction is by not presenting all relevant evidence to the magistrate, the Government further expands the bounds of their search because there is no limitation on subsequent seizures of property after the property listed in the warrant is located. Thus, by presenting only one item to the magistrate, upon which probable cause certainly exists, the executing officer has carte blanche to search.

For what has been accomplished is a verification of the formula proscribed by the Fourth Amendment. Now law enforcement personnel are encouraged to deliberately present only limited evidence to a magistrate so as to gain access to protected areas: Once inside, "plain view" validates the seizure of any item that is merely suspicious.

The deliberate failure of the police to present all relevant information, such as the existence of the package of June 23, 1978 to an independent and neutral magistrate reflects negatively on their good faith intentions to abide by the Fourth Amendment. The police should not be able to bootstrap their seizure of items for which a warrant could have, indeed should have, been obtained, by a utilization of the "inadvertence" theory of Coolidge v. New Hampshire.

Justice Douglas saw the problem in its proper perspective:

> Power is a heady thing; and history shows that the police acting on their own cannot be entrusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. McDonald v. U.S., 335, U.S. 451 at 456 (1948).

The proper approach is to require those zealous police officers, intent on invading the privacy of an individual's home, to submit the pertinent and relevant evidence to the magistrate. For it is he, not the police whom our society entrusts with the authority to weigh the evidence with an objective mind and decide whether the need to invade a citizen's home exists.

POINT IV

THE COURT BELOW FAILED TO DEAL WITH THE SUBSIDIARY ISSUE OF CONSENT, FOR IF THE SEIZURES ARE HELD TO BE INVALID UNDER THE PLAIN VIEW THEORY, THE GOVERNMENT'S ALTERNATIVE ARGUMENT THAT THERE WAS A CONSENT TO SEARCH MUST BE CONSIDERED AND DENIED.

The Court of Appeals apparently perceived no necessity of discussing this issue due to the content of their holding. To the contrary, the issue of the validity of consent is of critical importance where the police are acting pursuant to a warrant perversely obtained.

The Supreme Court, in Bumper v. North Carolina, 391 U.S. 543 (1968) held:

> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he had the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified

> on the basis of consent if it turns out that the warrant was invalid... .

"Consent" is not, therefore, obtained when the approval is only given because the citizen has been confronted with a warrant. Here, the appellant's grandmother, Mrs. Conacchio, initially refused the inspectors entry. She only "consented" after being confronted with the invidious warrant and told that because it was a court order, her consent was not really required. In essence, neither she nor Mrs. Liberti, upon her return home, consented, rather they submitted to the demands of the authorities.

In Schneckloth v. Bustamante, 412 U.S. 218 (1973) this court held that an individual needn't be aware that he may refuse to consent. As long as the

consent was freely and fairly given, the actions of the police would be upheld. Still, the court was sensitive to coercion by the police.

> ...[I]f under all the circumstances it has appeared that the consent was not given voluntarily - that it was coerced by threats or force, or granted only in submission to a claim of lawful authority - then we have found the consent invalid and the search unreasonable. [citing Bumper, supra.]. 412 U.S. at 229, 233.

Thus, assuming this Court determines the seizures do not comply with the plain view exception, the "consent" of Mrs. Conacchio cannot serve to validate the seizure of the cosmetics from the Liberti home. Such convoluted logic should not be preserved.

CONCLUSION

It is respectfully submitted that the within petition be granted and that this Court issue a writ of certiorari ~~issued~~ to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

GEORGE DAVID ROSENBAUM
Attorney for Petitioner
Office & P.O. Address
51 Chambers Street
New York, New York 10007
(212) 233-8120

SEARCH WARRANT AND APPLICATION

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

In the Matter of an Application for a Search Warrant to Seize and Open One (1) Cardboard Box and Its Contents, Located at 2029 Hering Street, Bronx, New York.

Docket No. 78
Case No. 724

SEARCH WARRANT

To JAMES J. BOYLE, OR ANY OTHER AUTHORIZED FEDERAL OFFICER OR AGENT

Affidavit having been made before me by Postal Inspector James J. Boyle

that he has reason to believe that { on the premises known as }

2029 Hering Street, Bronx, New York, said premises being the residence of Vincent and Barbara Liberti,

in the Southern District of New York,

there is now being concealed certain property, namely one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violations of Title 18, United States Code, Section 1341,

and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the person or premises above described and that grounds for application for issuance of the search warrant exist as stated in the supporting affidavit(s).

You are hereby commanded to search within a period of ten (10) days (not to exceed 10 days) the person or place named for the property specified, serving this warrant and making the search { in the daytime (6:00 a.m. to 10:00 p.m.) / at any time in the day or night* } and if the property be found there to seize it, leaving a copy of this warrant and receipt for the property taken, and prepare a written inventory of the property seized and promptly return this warrant and bring the property before ---------- as required by law.

Federal Judge or magistrate

Dated this 10 day of July, 1978.

Leonard Bernikow
United States Magistrate

Judge (Federal or State Court) -- Federal Magistrate

JUL 10 1978

*The Federal Rules of Criminal Procedure provide: "The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime." (Rule 41(c)). A statement of grounds for reasonable cause should be made in the affidavit(s) if a search is to be authorized "at any time day or night" pursuant to Rule 41(c).

RETURN

I received the attached search warrant July 10, 1978, and have executed it as follows:

On July 10, 1978 at 3:45 o'clock PM, I searched the person or premises described in the warrant and

I left a copy of the warrant with Barbara Liberti
(name of person searched or owner or "at the place of search")

together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Numerous boxes of sample cosmetics, cosmetics, & tote bags as well as a number of bags (paper) containing additional amounts of these items

This inventory was made in the presence of Carole J. Cassidy, Sandra O'Brien and James Burgess

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

Postal Inspector

Subscribed and sworn to and returned before me this JUL 11 1978 day of , 19 .

Leonard Bernikow
Federal Magistrate

United States District Court

FOR THE

SOUTHERN DISTRICT OF NEW YORK

Docket No. 26

Case No. 724

In the Matter of an Application for a Search Warrant To Seize and Open One (1) Cardboard Box and Its Contents, Located at 2029 Hering Street, Bronx, New York.

AFFIDAVIT FOR SEARCH WARRANT

Leonard Bernikow

BEFORE THE HONORABLE ~~HAROLD J. RABY~~, United States Courthouse, Foley Square, New York, New York 10007
(name of judge or magistrate)

The undersigned being duly sworn deposes and says:

That he has reason to believe that ~~on the premises known as~~ (on the premises known as)

2029 Hering Street, Bronx, New York, said premises being the residence of Vincent and Barbara Liberti,

in the Southern District of New York,

there is now being concealed certain property, namely one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violations of Title 18, United States Code, Section 1341,

~~which~~
(state grounds for search and seizure)

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:*

[SEE RIDER ATTACHED]

Postal Inspector
(Official Title, if any)

Sworn to before me, and subscribed in my presence, JUL 10 1978, 19

Leonard Bernikow
Federal Magistrate

Leonard Bernikow
United States Magistrate
S.D.N.Y.

*United States Judge or Judge of a State Court of Record.
If a search is to be authorized "at any time in the day or night" pursuant to Rule 41(c), show reasonable cause therefor.
If the warrant is to authorize execution pursuant to 21 U.S.C. § 879 without prior notice of authority or purpose, include the circumstances creating the need for such a warrant.

RIDER

I, James J. Boyle, am a United States Postal Inspector.

1. For the past several weeks I have been investigating possible mail fraud violations by employees of the Saks Fifth Avenue store at 611 Fifth Avenue, New York, New York.

2. I am informed by Paul Bendorius, an employee of Saks Fifth Avenue's corporate security department, that during the last two weeks he has personally observed brown cardboard boxes being prepared for mailing in Saks' delivery department. These boxes are addressed by hand and lack the invoices and other documents that should accompany outgoing parcels that are mailed in the ordinary course of Saks' business.

3. I am further informed by Mr. Bendorius that the addressees of these boxes frequently are the wives of persons employed by the Saks Fifth Avenue supply room or delivery department. Mr. Bendorius has had occasion to open several of these boxes before delivery to the addressees, and has found in them clothes, cosmetics, and other property and merchandise belonging to Saks Fifth Avenue.

4. Postal authorities who deliver mail in the Bronx informed me that a brown cardboard box addressed to Mrs. Barbara Liberti was delivered to her at 2029 Hering Street, Bronx, New York, on June 29, 1978.

5. I am informed by Mr. Bendorius that he had occasion to inspect the contents of the box delivered to Mrs. Liberti prior to its delivery, and it contained Estee Lauder gift boxes that belong to Saks Fifth Avenue.

6. I am informed by Mr. Bendorius that Vincent Liberti is an employee in Saks Fifth Avenue's supply room, and that he resides at 2029 Hering Street, Bronx, New York.

7. Based on the above facts, I believe that a search of the Liberti residence at 2029 Hering Street, Bronx, New York, will result in the discovery of evidence of violations of Title 18, United States Code, Section 1341.

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of

A Motion for the Return of Property Seized Pursuant to Warrant at 2029 Hering Street, Bronx, New York.

M 9150

MEMORANDUM ORDER

VINCENT L. BRODERICK, U.S.C.J.

I.

Introduction

Vincent Liberti and Barbara Liberti, his wife, ("applicants") seek an order directing that certain property, purportedly seized pursuant to a search warrant, be suppressed as evidence and directing that said property be returned to applicants. See Rules 12(b) (3), 41(e), 41(f), Fed.R.Cr.P. An evidentiary hearing on applicants' motion was held on August 7, 1978.

Rudy King, who, like Mr. Liberti, was an employee of Saks Fifth Avenue ("Saks"), informed Postal Inspector

James J. Boyle that King had mailed packages to the Liberti home for approximately one year. Except for two packages, the contents and dates of mailing of such packages were unknown. It was known that one such package was mailed on June 23, 1978, but the contents of that package were unknown. A second package, mailed on June 29, 1978, was known to consist of a single brown box containing Estee Lauder cosmetic gift boxes. Inspector Boyle was advised by an Assistant United States Attorney that probable cause existed only as to that single box. Accordingly, a search wartant was sought by Inspector Boyle and issued by the magistrate with repect to only that one brown box.

II

The Search Warrant

On July 10, 1978 Magistrate Leonard Bernikow issued a search warrant

for the residence of Vincent and Barbara Liberti at 2029 Hering Street, Bronx, New York, on the basis of an affidavit by Inspector Boyle that he had reason to believe that "there is now being concealed certain property, namely one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violations of Title 18, United States Code, Section 1341."

The affidavit of Inspector Boyle set forth that he had, for several weeks, been investigating possible mail fraud violations by Saks employees; that he had been informed by a Saks corporate security employee that the addresses of brown cardboard boxes prepared for mailing in Saks' delivery department and lacking invoices or other documentation were frequently the wives of Saks supply room or delivery room employees; and that

several of such boxes, examined before delivery, were found to contain clothes, cosmetics, and other Saks property and merchandise. The affidavit stated that postal authorities had informed Boyle that a brown cardboard box addressed to Mrs. Liberti had been delivered to her at 2029 Hering Street, Bronx, on June 29, 1978, and that the Saks corporate security employee had told him that the box contained Estee Lauder gift boxes belonging to Saks. The affidavit identified Vincent Liberti as an employee of Saks who lived at 2029 Hering Avenue.

III

Execution of the Search Warrant

Prior to the execution of the warrant, Inspector Boyle had a conversation with Postal Inspector O'Brien, who was an attorney and was in charge of the execution of the search warrant. Boyle told O'Brien that items other than

the single box listed in the warrant could be seized if such other property was not properly in the Liberti residence. However, Boyle also told O'Brien that when the matter listed in the search warrant was found, the search was to cease.

Four persons executed the search warrant: Inspector O'Brien, Postal Inspector Neil Schorr, Postal Inspector Carole Cassidy, and James Burger, the securtity operations manager for Saks. Burger participated in the execution of the warrant for the purpose of identifying any Saks merchandise found in the Liberti home.

On July 10, 1978, at about 3:20 p.m., the three postal inspectors and Mr. Burger approached the Liberti residence. O'Brien rang the doorbell. The Liberti's son, 12 or 13 years old, responded, stated that his parents were not at home, and summoned his grandmother, Mrs. Lonacchio,

who lived upstairs in a separate residence. Inspector O'Brien introduced the group to Mrs. Lonacchio and informed her that their purpose was to execute a search warrant. She became upset and refused them entry. Inspector O'Brien explained that they had a court order and had a right to be there, but that they would appreciate it if Mrs. Lonacchio would be there as a witness while the warrant was executed.

Mrs. Liberti then returned home and was presented with the warrant. She too initially refused entry and was very upset. But she allowed admittance when Inspector O'Brien informed her that the search warrant was a court order and that he did not need her consent.

Mrs. Lonacchio was present throughout the entire search. Mrs. Liberti consistently denied having any of the items listed on the warrant, and in

fact those items were never found.

During the search of the living area of the house Mrs. Liberti walked to a hallway closet, opened the closet door, and stated, "This is all I have." Numerous boxes were on the top whilf of the closet. Certain of the boxes were unmarked, while others were clearly marked as cosmetics. Burger identified the boxes as containing merchandise sold by Saks. The boxes were seized.

After having searched the living area, the inspectors asked if there was a basement, and Mrs. Liberti pointed to a door. The basement was an area used in common by the Libertis and the Lonacchios.

The inspectors also asked if they could search the unattached garage. Mrs. Liberti told him that she and her family had no access to the unattached garage and that the garage belonged exclusively to her mother and father. Inspector O'Brien

then asked Mrs. Lonacchio if she would permit a search of the garage. She agreed to the search.

Inspectors O'Brien, Schorr, and Cassidy then proceeded to search the remainder of the Liberti's apartment, the basement, and the garage. Numerous boxes, tote bags, and cartons were discovered and seized.

IV

Applicants argue that the search and seizure exceeded the scope of the search warrant and that, therefore, the search and seizure were unconstitutional under the Fourth Amendment.

The Government contends that the search and seizure were lawful. In support of its contention, the Government relies in part on the "plain view" exception to the Fourth Amendment warrant requirement and in part on the doctrine of consent. The Government argues that the

"plain view" doctrine validates the seizure of all the items that were found in applicants' apartment and in the basement. The Government argues that the seizure of the itmms that were found in the unattached garage. The Government contends that the consent was given by Mrs. Liberti's mother as the owner of the garage.

For the reasons stated below, I find that applicants are entitled to an order directing that all of the seized property be suppressed as evidence against applicants in any criminal proceeding, but are not entitled to an order directing the return of the seized property to applicants.

V

Motion to Suppress

Plain View Exception

To validate the seizure of the property found in the applicants' apartment and in the basement of their building, the Government relies on the "plain view" exception to the Fourth Amendment

warrant requirement.

The leading case on the "plain view" exception is Coolidge v. New Hampshire, 403 U.S. 443, rehearing denied, 404 U.S. 874 (1971). The "plain view" issue in Coolidge was whether the warrantless search and seizure of Coolidge's car could be validated on the theory that the car was an instrumentality of a crime and thus legally seizable by the police, who were effecting a lawful arrest, because the car was in plain view. 403 U.S. at 464. The Court held that the "plain view" exception did not validate the seizure of the car.

The Court found that the "plain view" exception is applicable only in limited circumstances:

> It is well established that under certain circumstances the police may seize evidence in plain view without a warrant. But it is important to keep in mind

> that, in the vast majority of cases, any evidence seized by the police will be in plain view, at least at the moment of seizure. The problem with the "plain view" doctrine has been to identify the circumstances in whicy plain view has legal significance rather than being simply the normal concimitant of any search, legal or illegal.

***

> What the "plain view" cases have in common is that the police officer in each of them had prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused.

Thus under Coolidge the "plain view" exception applies only to situations in which a government agent (1) with a prior justification for an intrusion (2) inadvertently discovers (3) a piece of evidence that incriminates the accused.

The key requirement, so far as the instant case is concerned, is the requirement that the discovery be inad-

vertent. Coolidge emphasized that whether or not this requirement is met depends on what the government agents expect to find in their search:

> (A) plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "per se unreasonable" in the absence of "exigent circumstances."
>
> If the initial instrusiion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants...

> particularly describing... (the) things to be seized." ... (T)o extend the scope of such an intrusion to the seizure of objects - not contraband nor stolen nor dangerous in themselves - which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure.

Id. at 470-71 (emphasis added).

In this case, the "plain view" exception does not validate the seizures because the inspectors' discovery of evidence not specified in the warrant was not inadvertent. See id.

Inspector Boyle knew that packages had been mailed to the Liberti home from Saks for approximately one year. He believed that items other than the matter specified in the warrant would be found, and in fact he ordered the other inspectors to seize such items if found.

Inspector Schorr went into the Liberti home intending to seize any and all cosmetics he could find. At the Liberti home he was engaged in a general search for cosmetics. Inspectors O'Brien and Cassidy possessed an intent not so broad as Schorr's but certainly broader than an intent to seize merely the matter specified in the warrant.

That the discovery of other evidence was not inadvertent but anticipated is also evidenced by the presence of James Burger, the Saks agent, during the execution of the search warrant. Burger was present in order to be able to identify as Saks goods any goods that were found. Because the matter specified in the search warrant was sent to applicants' residence in a readily identifiable package, the contents of which package were also readily identifiable (as Estee Lauder cos-

metic gift boxes), it is clear that Burger was present to identify other items, not specified in the search warrant, that the postal inspectors expected to find.

Application here of the "plain view" exception would be especially inappropriate because the Government deliberately presented only limited evidence to the magistrate in procuring the search warrant. Despite the inspectors' knowledge that packages from Saks had been mailed to the Liberti home for at least one year and despite the inspectors' strong belief that cosmetics items other than those named in the warrant would be found in the Liberti home, the inspectors presented a magistrate with specific evidence only pertaining to, and a request for a warrant only with respect to, the June 29, 1978 box. To approve such a search warrant, and to

validate a general seizure thereunder, would be to find, in practical effect, that the "plain view" doctrine has reinstated was validated the general warrant. To approve such a warrant would encourage law enforcement officers to seek search warrants for the limited purposes of access to otherwise forbidden premises; once government agents obtained access to the subject premises, the agents could invoke the "plain view" doctrine to make any pickings fair game.

Here the initial presentation to the magistrate was carefully circumscribed, upon the advice of an Assistant United States Attorney that probable cause existed only as to the single package described. Certainly law enforcement officers should be encouraged to seek prosecutorial advice with respect to the parameters of probable cause. But there is something amiss and violative of the

mandate of Coolidge when the prosecutor narrowly circumscribes the scope of an application for search warrant (and hence the scope of the search warrant itself), and then the law enforcement officials, whether on advice of the prosecutor or on their own, act on the principle that the "plain view" exception removes any such circumscription and permits the executing agents to seize any and all matter found in the premises searched. See United States v. Campbell and Tartt, 581 F. 2d 22, 27 n.9 (2d Cir. 1978) (We do not suggest that an Assistant U.S. Attorney possesses the neutrality and detachment of a judicial officer, Johnson v. United States, 333 U.S. 10, 13-14 (1948), or that the procedure described in this opinion (which was a consultative procedure similar to that used herein) could possibly satisfy the warrant requirement.").

In Coolidge the New Hampshire Attorney General, who had actively investigated the crime and who was later the chief prosecutor, signed the search warrant in his capacity as a justice of the peace. The Court concluded that in light of these facts, "the search stands on no firmer ground than if there had been no warrant at all." 403 U.S. at 453. This conclusion was based on a "per se rule of disqualification," id. at 450, against a law enforcement officer's acting as a judicial officer in regard to the issuance of a search warrant: "prosecutors and policemen simply cannot be asked to maintain the requisite neutrality with regard to their own investigations - the 'competitive enterprise' that must rightly engage their single-minded attention." Id. (footnote omitted).

The case before me presents the next logical step in the attempted

circumvention of the warrant requirement of the Fourth Amendment. Although the warrant in this case was signed by a magistrate, the Government precluded a full and fair finding of probable cause by unilaterally making a prior determination that probable cause existed as to only the June 29, 1978 package; and the Government's possession leading to the Government's belief that other cosmetics items would be found and despite an intent to seize such items.

The Government's actions in obtaining and executing the warrant were inconsistent with the relevant principles announced in Coolidge. The "plain view" exception does not apply here.

This conclusion is not inconsistent with the cases cited by the Government.

United States v. Pacelli, 470 F.2d 67, 71 (2d Cir. 1972), cert.

denied, 410 U.S. 983 (1973), invoked the plain view exception to uphold the seizure of evidence as to which the government agents had no prior knowledge and which the agents had no intent to seize prior to its being found.

United States v. Companile, 516 F. 2d 288, 291 (2d Cir. 1975), applied the plain view exception to validate the seizure of "evidence discovered by chance in the course of a lawful search...." (emphasis added).

United States v. Rollins, 522 F.2d 160, 166 (2d Cir. 1975), cert. denied, 424 U.S. 918 (1976), held that the plain view exception was applicable in part on the basis of the finding that "(t)here is no evidence to indicate that the police had prior knowledge of the (seized evidence) or (its) location, nor of any intent to seize tham prior to their discovery."

United States v. Morell, 524 F.2d 550 (2d Cir. 1975), and United States v. Montrell, 526 F.2d 1008 (2d Cir. 1975), are also distinguishable. In Morell the Court distinguished Coolidge by stating that Coolidge's "inadvertence requirement does not apply to cases where the prime motivation of an entry is to appregend persons whom the police have probable cause to arrest." 524 F.2d at 555-56. No such motivation was involved in this case. In Montrell the Court followed Morell in distinguishing Coolidge and also noted the presence of "exigent circumstances," 526 F.2d at 1010, which removed the need for the agents to obtain warrants. Therefore, evidence seized in plain view was held admissible even though the agents anticipated that the evidence would be present and intended to seize it. Here, there were no exigent circumstances that precluded the postal inspec-

tors from obtaining a warrant that covered the disputed items.

In United States v. Dias, 577 F.2d 821, 824 (2d Cir. 1978), the court, relying on the plain view exception, explicitly found that "(t)he requirement of inadvertence is clearly satisfied."

In United States v. Auterbridge, 375 F.Supp. 418 (S.D.N.Y. 1974), the court, in an alternative holding, relied on the plain view exception to validate a seizure. The court cited Pacelli, supra, and Coolidge, in support of that holding and thereby implied its recognition of the Coolidge inadvertence requirement.

Consent

The Government argues that Mrs. Liberti and her mother, Mrs. Lonacchio, consented to the search of the unattached garage and that, therefore, the property seized in the garage is admissible. I do not agree.

In Bumper v. North Carolina,

391 U.S. 543 (1968), the Supreme Court held that there can be no valid consent when the "consent" is given only after the officer has asserted that he has a warrant:

> The issue thus presented is whether a search can be justified as lawful on the basis of consent when that "consent" has been given only after the official conducting the search has asserted that he possesses a warrant. We hold that there can be no consent under such circumstances.
>
> When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority. A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid...

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion - albeit colorably lawful coercion. Where there is coercion there cannot be consent.

Id. at 548-50 (emphasis added; footnotes omitted).

In Schneckloth v. Bustamonte, 412 U.S. 218 (1973), the Court held that whether or not a consent was voluntarily given and hence valid is a question of fact to be determined from the totality of the circumstances; thus a consent that is in any way coerced is not a valid consent:

> (T)he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the

> circumstances. ...
>
> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed.

Id. at 227-28. Accord, United States v. Diaz, 577 F.2d 821, 823 n.2 (2d Cir. 1978).

The Court in Schneckloth indicated a particular sensitivity to any police coercion, however, subtle, and to the subjective state of mind of the person who consents:

> (I)n examining all the surrounding circumstances to determine if in fact the consent to search was coerced, account must

be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents....

***

...(I)f under all the circumstances it has appeared that the consent was not given voluntarily - that it was coerced by threats or force, or granted only in submission to a claim of lawful authority - then we have found the consent invalid and the search unreasonable. (citing Bumper, supra).

412 U.S. at 229, 233 (emphasis added).

The issue is whether Mrs. Lonacchio's "consent" comports with the constitutional requirements of Bumper and Schneckloth. I find that it does not.

When the fourt postal inspectors and Mr. Burger arrived, Mrs. Lonacchio was initially presented with the warrant. She was very upset and

shocked, and initially she refused entry to the Liberti home. She was told her consent was not needed because the warrant was a court order. After Mrs. Liberti had returned, the search was begun and Mrs. Lonacchio was present for the entire search. She was present when the basement, of which she and her husband were co-users, was searched and when items found there were seized.

Under the totality of the circumstances, I find that her consent to search the garage was no voluntary and hence was not a legally valid consent. An average layperson, having been caught in the midst of a search of the property of a close relative, having seen her own property searched, and having been told earlier that her consent was not needed because the warrant was a court order, could only surmise that her "consent" to a further search was a

mere formality. Mrs. Lonacchio did no more than submit to a claim of lawful authority. Schneckloth v. Bustamonte, supra, 412 U.S. at 233. There was no free and voluntary consent. "The situation (was) instinct with coercion ..., (and) where there is coercion there cannot be consent." Bumper, supra, 392 U.S. at 550.

The Government has argued that applicants may not have standing to seek the suppression of the evidence seized in the basement and the garage. In their supporting affidavit, dated July 20, 1978, applicants have stated that the basement and the garage were in the exclusive possession of Mrs. Liberti's parents. Affidavit ¶5. The Government argues that, in light of this statement an in light of the statement that applicants have standing because they are "the lawful owners" of the

seized property, id., the Government is entitled to have the affidavit struck because Mr. Liberti, who signed the affidavit, was unwilling to submit to cross-examination at the hearing concerning his claim of "lawful ownership" of the property.

The Government's motion to strike is denied. The affidavit also states that "the property was in the possession of the movants at the time it was seized." Id. ¶6. Although cross-examination might have undermined applicants' claim to "lawful ownership," I find that cross-examination would not have altered the fact that the property was in the possession of applicants. Mr. Liberti's unwillingness to undergo cross-examination on his affidavit statements therefore did not prejudice the Government.

Motion for Return of Property

Applicants have moved for an order directing that the illegally seized property be returned to them on the ground that they are entitled to lawful possession of that property. See Rule 41(e), Fed.R.Cr.P.

I have received evidence on the issues of fact necessary to the decision of this motion, see id., and I find that the motion must be denied.

The evidence presented at the hearing tended to show that the seized property may have been the fruit of an illegal scheme. As such, that property is presently subject to lawful detention and will not be returned to applicants at this time. E.g., United States v. Margeson, 259 F. Supp. 256, 272 (E.D. Pa. 1966).

SO ORDERED.

Dated: New York, NY
January 3, 1979

VINCENT L. BRODERICK
U.S.D.J.

MEMORANDUM ORDER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

In the Matter of :

A Motion for the Return of Property :
Seized Pursuant to Warrant at 2029
Hering Street, Bronx, New York :

----------X

VINCENT L. BRODERICK, U.S.D.J.

On January 3, 1979, I issued a memorandum order that granted a motion for the suppression of certain evidence. On January 19, 1979, the Government moved for leave to reargue.

The Government's motion to reargue is granted. After due consideration, I adhere to the order of January 3, 1979.

The Government relies on United States v. Hare, No. 78-5520 (6th Cir. January 8, 1979), a case decided by the Court of Appeals for the Sixth Circuit after the memorandum order was issued.

The relevant holding in Hare is that "inadvertence" with respect to unscheduled items seized in the course of a search pursuant to a warrant "means that the police must be without probable cause to believe evidence would be discovered until they actually observe it in the course of an otherwise-justified search." Id., slip op. at 5. In its affidavit in this case, the Government implies that application of the Hare holding to the facts of this case would lead to a result different than that reached in the memorandum order.

The key element in my memorandum order, and in Hare, was the interpretation of Coolidge v. New Hampshire, 403 U.S. 443, rehearing denied, 404 U.S. 874 (1971). Part I of Coolidge, a part of Hare Court largely disregarded, dealt with the Fourth Amendment requirement that a search warrant be issued by a detached

and neutral magistrate. See Coolidge, supra, 403 U.S. at 449-53. The Coolidge Court concluded that the state attorney general in question in Coolidge "was not the neutral and detached magistrate required by the Constitution,..." id.at 453, and that, therefore, "the search stands on no firmer ground than if there had been no warrant at all." Id. Only after the Court had thus held did the plurality opinion go on to examine, in Part II of the opinion, the other theories, including the plain view exception, that were proffered by the state to justify the search. See Id. at 453-73. Moreover, the plurality opinion makes clear that the magistrate requirement is closely related to and is to be considered in connection with the plain view exception:

> The rationale for the "plain view" exception is evident if we keep in mind the two distinct constitutional protections

> served by the warrant requirement. First, the magistrate's scrutiny is intended to eliminate altogether searches not based on probable cause. The premise here is that any intrusion in the way of search or seizure is an evil, so that no intrusion at all is justified without a careful prior determination of necessity.

Id. at 467.

In the memorandum order, I considered the magistrate requirement in connection with the plain view exception and explicitely relied on the Government's attempted circumvention of the magistrate requirement as a grounds for refusing to apply the plain view exception. Memorandum Order of January 3, 1979 at 11-14. I also expressly stated that:

> (T)he Government failed in the first instance to present to the magistrate whatever evidence it had regarding the other property so that he could make the constitutionally required determination that probable cause did or did not exist as to that other

> property. If the Government had done so, this might be a different case.

Id. at 23-24 n.7.

In its opinion in Hare, the Sixth Circuit did not give express consideration to the magistrate requirement in connection with the plain view exception.

In the context of a search pursuant to a warrant, the Hare holding and the reading of Coolidge presented in the memorandum order may be reconciled if "inadvertence" is construed to mean that the police must be without probable cause to believe evidence would be discovered, provided that the police have tendered to a detached and neutral magistrate and information in their possession so that, prior to the search, the magistrate will have been able to make the relevant determination as to probable cause. I read Coolidge as supporting such a construc-

tion. Application of that construction does not lead to a result different than that reached in the memorandum order.

SO ORDERED

VINCENT L. BRODERICK,
U.S.D.J.

Dated: New York, New York
March 1, 1979

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1189—August Term, 1978.

(Argued July 18, 1979 Decided January 25, 1980.)

Docket No. 79-1127

UNITED STATES OF AMERICA,

Respondent-Appellant,

—v.—

VINCENT and BARBARA LIBERTI,

Movants-Appellees.

Before:

VAN GRAAFEILAND, NEWMAN and KEARSE,
Circuit Judges.

Appeal from (1) an order of the United States District Court for the Southern District of New York, Broderick, *J.*, suppressing evidence seized by United States Postal Inspectors during an authorized search of appellees' residence and (2) an order, following reargument, adhering to the original suppression order.

Reversed.

DAVID C. PATTERSON, Assistant United States Attorney, Southern District of New York, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney and Richard D. Weinberg, Assistant United States Attorney, Southern District of New York, New York, N.Y., on the brief), *for Respondent-Appellant.*

GEORGE DAVID ROSENBAUM, New York, N.Y., *for Movants-Appellees.*

VAN GRAAFEILAND, *Circuit Judge:*

This is an appeal from (1) an order of the United States District Court for the Southern District of New York suppressing evidence seized by United States Postal Inspectors during an authorized search of appellees' residence and (2) an order, following reargument, adhering to the original suppression order.

FACTS

On June 12, 1978, James Boyle, a United States Postal Inspector, was informed by security personnel at Saks Fifth Avenue that several employees were believed to be stealing merchandise and sending it home through the mail. Appellee Vincent Liberti was one of those under suspicion. An employee in the Saks mailing room told Boyle that he had mailed "several parcels" to the Liberti residence during the preceding year. He could, however, fix no specific dates for the mailings and had no knowledge as to the contents of the

packages. Other employees stated that parcels "may have been mailed" to the Liberti address but did not say how many.

Following Boyle's entry on the scene, two packages addressed to the Liberti home were identified as they passed through the mail room, one on June 23 and the other on June 29. The contents of the first box were unknown; the second contained Estee Lauder cosmetic gift boxes. Postal authorities were unable to determine whether the first box was delivered, because their attempt to put a stop on it was unsuccessful. They did ascertain, however, that the second box was delivered to the Liberti residence.

Prior to applying for a search warrant, Boyle conferred with an Assistant United States Attorney, who advised him, correctly, we believe, that probable cause for the issuance of a warrant existed only as to the June 29 box. Accordingly, Boyle's application was directed to the June 29 mailing. In his affidavit, Boyle stated that for the preceding several weeks he had been investigating possible mail fraud violations at Saks; that during this time a Saks security employee had observed brown cardboard boxes being prepared for mailing; that these were addressed by hand and lacked the customary invoices and mailing documents; that several of these boxes had been opened and were found to contain clothes, cosmetics, and other Saks merchandise. The affidavit stated further that a brown cardboard box addressed to Mrs. Liberti was delivered to her on June 29; that the contents had been examined prior to mailing and consisted of Estee Lauder gift boxes belonging to Saks. The warrant issued by a United States magistrate authorized the search of the

Liberti premises and the seizure of "one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violation of Title 18, United States Code, Section 1341."

The warrant was executed on July 10, 1978, by three postal inspectors, who were accompanied by the security operations manager of Saks, a Mr. Burger. Although Boyle did not know what property would be found in the Liberti residence, he "believed" or "assumed" that Saks merchandise other than that contained in the June 29 mailing might be found. He instructed the inspector in charge of the search that he could seize any items belonging to Saks that were not properly in the residence until he found the goods covered by the warrant, at which time the search was to cease.[1] Mr. Burger was along to identify Saks merchandise.

The inspectors were admitted by Mrs. Liberti, who was given a copy of the warrant and told that the inspectors were looking for the brown box containing Estee Lauder cosmetics. At first, Mrs. Liberti denied having the cosmetics, but, after being told that the search would have to be made, she went to a hall closet, opened the door, and said "this is all I have" or "this is all there is." Inside the closet, in plain view on both the shelf and the floor, were stacked boxes of cosmetics, which Mr. Burger believed were Saks items.

1 Although one of the three inspectors apparently did not understand that the search was to be limited to the June 29 box and its contents, that inspector did not discover or seize any of the evidence which appellees are seeking to suppress.

These were seized by the inspectors. The brown box was not in the closet.[2]

Mrs. Liberti was then asked if there was a basement, and she opened the basement door and turned on the cellar light for two of the inspectors. As the inspectors descended into the basement, they saw in plain view under the open stairway a quantity of boxes and shopping bags containing additional cosmetics. When Mr. Burger indicated his belief that this was also Saks merchandise, it too was seized. After the inspectors discovered this merchandise, Mrs. Liberti stated again that "that is all there is, there is no more."[3] The entire search lasted about one hour and was conducted in a polite and gentlemanly manner.

Because the merchandise seized by the inspectors was not in brown box, it may not all have been delivered in the June 29 mailing. The Government argued nonetheless that seizure was justified because the inspectors were lawfully on appellees' premises to search for the brown cardboard box and its contents and the items seized were in plain view of the inspectors during their search. The district court, relying mainly on *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), held that the plain view doctrine did not apply, because the inspectors' discovery of the seized items

2 The brown box involved in the June 29 mailing was never found. A brown box was found in a garage on the premises, but the district court held that the garage was not owned by the Libertis and that no consent for its search was given. The Government does not contest this finding on appeal.

3 The inspectors also found a blue nylon bag and a brown tote bag, both identified as Saks merchandise, in the closet of a bedroom. The Government does not contest on appeal the suppression of these two items, limiting its claim in this Court to the merchandise seized in the hall closet and the basement.

was not inadvertent but was instead "anticipated." The court refused, however, to order the seized merchandise returned to appellees, stating that the evidence tended to show that it "may have been the fruit of an illegal scheme."

DISCUSSION

Although the portion of Justice Stewart's opinion in *Coolidge v. New Hampshire, supra,* that added the concept of inadvertence to the traditional doctrine of "plain view" was concurred in by only three justices, most courts have accepted it as the law of the land. *See, e.g., United States v. Berenguer,* 562 F.2d 206, 210 (2d Cir. 1979); *United States v. Griffith,* 537 F.2d 900, 903 (7th Cir. 1976); *United States v. Cushnic,* 488 F.2d 81, 82 (5th Cir. 1973), *cert. denied,* 419 U.S. 968 (1974); *United States v. Gray,* 484 F.2d 352, 355 n.7 (6th Cir. 1973); *but see United States v. Bradshaw,* 490 F.2d 1097, 1101 n.3 (4th Cir. 1974). There has not, however, been a unanimity of opinion as to what this portion of *Coolidge* really stands for. *See United States v. Santana,* 485 F.2d 365, 369 n.8 (2d Cir. 1973), *cert. denied,* 415 U.S. 931 (1974).

For example, Justice Stewart carefully pointed out that *Coolidge* did not involve contraband or stolen goods. 403 U.S. at 472. He stated that "to extend the scope of [a lawful] intrusion to the seizure of objects—not contraband nor stolen nor dangerous in themselves—which the police know in advance they will find in plain view and intend to seize, would fly in the face of the basic rule that no amount of probable cause can justify a warrantless seizure." *Id.* at 471. Justice

White, who dissented, recognized that the Court was making a distinction between plain evidence and contraband. Referring to Justice Stewart's opinion, he said, "[a]pparently contraband, stolen, or dangerous materials may be seized when discovered in the course of an otherwise authorized search even if the discovery is fully anticipated and a warrant could have been obtained." *Id.* at 519. Justice Black, who also dissented on this point, apparently construed the plurality opinion in the same manner. *See id.* at 507 n.4.

A number of lower courts have also interpreted Justice Stewart's opinion literally and have held the "inadvertence" doctrine inapplicable to stolen goods or contraband. *See, e.g., United States v. Cutts,* 535 F.2d 1083, 1084 (8th Cir. 1976); *United States v. Carwell,* 491 F.2d 1334, 1336 (8th Cir.), *cert. denied,* 417 U.S. 949 (1974); *United States v. Smollar,* 357 F. Supp. 628, 633 (S.D.N.Y. 1972). Indeed, this Court has stated on at least one occasion that this might be the proper reading of Justice Stewart's opinion. *See United States v. Zaicek,* 519 F.2d 412, 415 n.3 (2d Cir. 1975).

The Government, on the other hand, says it finds no sound basis for distinguishing between "mere evidence" and contraband and therefore does not urge it in this case. At the same time, it argues that the inadvertence requirement itself is analytically unsound and should be rejected. It may be that the Government would not consider the inadvertence requirement unsound if courts applied it only to "mere evidence" and not to what Judge Learned Hand once graphically described as *caput lupi, see United States v. Old Dominion Warehouse, Inc.,* 10 F.2d 736, 738 (2d Cir. 1926). It certainly could be argued that this is what Justice

Stewart intended. However, because the Government does not choose to make the argument, we will not reach out to decide it.

On the other hand, we have considered and find most persuasive the Government's contention that the postal inspectors did not "know" in advance that they would find the additional cosmetics in plain view and that, in the absence of this knowledge, their discovery was inadvertent. "What *Coolidge* proscribes is an anticipated discovery, where the police know in advance the location of the evidence and intend to seize it." *United States v. Bolts,* 558 F.2d 316, 320 (5th Cir.), *cert. denied,* 434 U.S. 930 (1977); *see Mapp v. Warden,* 531 F.2d 1167, 1172 (2d Cir.), *cert. denied,* 429 U.S. 982 (1976). For the Government to be charged with advance knowledge, it must at the very least have had probable cause to believe that the additional cosmetics would be found. *United States v. Hare,* 589 F.2d 1291, 1293-96 (6th Cir. 1979); *United States v. Marshall,* 452 F. Supp. 1282, 1287 (S.D. Fla. 1978); *United States v. Winston,* 373 F. Supp. 1005, 1007 (E.D. Mich. 1974), *aff'd,* 516 F.2d 902 (6th Cir. 1975). Mere expectation or suspicion that discovery would occur does not preclude application of the plain view doctrine. *United States v. Hare, supra,* 589 F.2d at 1294; *United States v. Worthington,* 544 F.2d 1275, 1280 n.4 (5th Cir.), *cert. denied,* 434 U.S. 817 (1977); *United States v. Cushnie, supra,* 488 F.2d at 82.

This was not the rule that the district judge followed. He held instead that inadvertence must be determined on the basis of what the government agents expected to find. Moreover, he refused to incorporate the more stringent requirements of "probable cause"

into his definition of "expectation" unless the police "have tendered to a detached and neutral magistrate all evidence and information in their possession so that, prior to the search, the magistrate will have been able to make the relevant determination as to probable cause." This was error.

Police officers applying for search warrants are not required to provide a magistrate with all the information in their possession. *United States v. Charlton,* 409 F. Supp. 1327, 1330-31 (E.D. Tenn. 1975), *aff'd,* 565 F.2d 86 (6th Cir. 1977, *cert. denied sub nom. Jacek v. United States,* 434 U.S. 1070 (1978); *United States v. Egorov,* 222 F. Supp. 862, 866 (E.D.N.Y.), *petition for cert. dismissed under Rule 60,* 375 U.S. 926 (1963). Where, as here, the police "know" or "have probable cause to believe" with respect to one shipment only, a requirement that they tender all evidence and information in their possession concerning possible other shipments is both impractical and unnecessary. A magistrate is not going to give them more searching authority than they seek, and wise police will not ask for more than that to which they are entitled. If the district court is suggesting that the police must request unlimited search and seizure in every case, even though they do not believe it is justified, we find the suggestion to be without merit. In summary, we hold that the inadvertence requirement of the plain view doctrine was satisfied in this case, and the district court erred in holding to the contrary.

In view of the Government's willingness to limit its claim of rightful seizure to the merchandise found in the hall closet and under the cellar stairs, we find no merit in appellees' alternative contention that the search exceeded the scope of the warrant.

With respect to the merchandise seized in the hall closet and under the cellar stairs of the Liberti residence, the orders appealed from are reversed. As to the remaining merchandise, they are affirmed.

NEWMAN, *Circuit Judge*, concurring in the result:

The "inadvertence" qualification to the doctrine of "plain view" seizures was endorsed in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), by only four Justices and was also rejected as unsound in that same case by four Justices. The uncertain status of the "inadvertence" notion has been noted by this Court, see *United States v. Morell*, 524 F.2d 550, 555 (2d Cir. 1975); *United States v. Santana*, 485 F.2d 365, 369-70 (2d Cir. 1973), and others, see, *e.g.*, *United States v. Bradshaw*, 490 F.2d 1097, 1101 n.3 (4th Cir. 1974). I would not deem it the law of the land, and I prefer not to resolve my own doubts about the doctrine in a case like this one, which does not require its acceptance or rejection.

Even as announced in Justice Stewart's plurality opinion in *Coolidge*, the "inadvertence" qualification has no application to stolen goods, 403 U.S. at 471. The goods at issue in this case were stolen, and that is sufficient reason for me to reject the "inadvertence" qualification here and reverse the suppression order, whether or not the Government chooses to advance this ground.

The majority prefers to rest decision on the ground that a "plain view" seizure of an item not covered by a search warrant is "inadvertent" when officers *lack* probable cause to search for and seize that item. That

approach creates the anomaly that a householder's interest in protecting his goods from seizure is made to turn on his ability to prove that the officers *had* probable cause, while the officers' authority to seize depends on their successful *disclaimer* of probable cause. The reversal of traditional roles on the issue of probable cause suggests that making "inadvertence" turn on the absence of probable cause may be unsound. Moreover, this approach places the householder in the position of probing for law enforcement information and thereby risking the integrity of continuing criminal investigations in order to prove the presence of probable cause, a matter normally not within his knowledge. The best that can be said for making inadvertence turn on the absence of probable cause is that it creates less of an anomaly than the District Court's approach. The latter obliges officers seeking a search warrant to delay their activity and occupy the time of the magistrate while they report all information in their possession so that the magistrate can decide whether they have probable cause to seize any items in addition to those for which they seek a warrant.

Perhaps these anomalies put in issue the basic soundness of the "inadvertence" qualification. In any event, whether there was "inadvertence" in this case need not be determined since the doctrine, even if valid, does not apply to stolen goods. For that reason, I concur in the result.

Supreme Court, U. S.
FILED
APR 25 1980
MICHAEL RODAK, JR., CLERK

No. 79-1318

In the Supreme Court of the United States

OCTOBER TERM, 1979

VINCENT LIBERTI, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 41a-51a) is not yet reported. The order of the district court (Pet. App. 5a-34a) is reported at 464 F. Supp. 164. The order of the district court on reargument (Pet. App. 35a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1980. The petition for a writ of cer-

tiorari was filed on February 25, 1980 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether stolen property seized in plain view from petitioners' residence by postal inspectors lawfully on the premises to execute a search warrant should have been suppressed on the ground that the discovery of the property allegedly was not "inadvertent."

STATEMENT

On July 10, 1978, postal inspectors conducted a search of petitioners' home pursuant to a search warrant issued by a federal magistrate. Petitioners thereafter filed a motion in the United States District Court for the Southern District of New York seeking suppression and return of the property that had been seized during the search. Following an evidentiary hearing, the district court granted the motion to suppress but denied the motion for return of the property (Pet. App. 5a-40a). The court of appeals reversed the suppression order (Pet. App. 41a-51a).

Prior to the entry of the suppression order, petitioner Vincent Liberti was charged, in an indictment filed in the district court on December 15, 1978, with mail fraud and conspiracy to commit that offense, in violation of 18 U.S.C. 1341 and 371. The property seized during the search at issue here is the principal

evidence against Liberti on the criminal charges, which remain pending in the district court.

The evidence is summarized in the opinion of the court of appeals (Pet. App. 41a-46a). It showed that on June 12, 1978, James Boyle, a United States Postal Inspector, was informed by security personnel at the Saks Fifth Avenue department store that several employees were believed to be stealing merchandise and sending it home through the mail. Petitioner Vincent Liberti was one of those under suspicion. An employee of the Saks mailing room told Boyle that he had mailed "several parcels" to the Liberti residence during the preceding year. However, he could fix no specific dates for the mailings and had no knowledge of the contents of the packages. Other employees stated that parcels "may have been mailed" to the Liberti address but did not say how many.

After Boyle began his investigation, two packages addressed to the Liberti home were identified as having passed through the mail room. One package had been mailed from Saks on June 23 and the other package had been delivered to the Liberti residence on June 29. The contents of the first box were unknown, and postal authorities were unable to determine whether that box had been delivered. The second box, delivered on June 29, was known to contain Estee Lauder cosmetic gift boxes.

Before applying for a search warrant, Boyle consulted with an Assistant United States Attorney, who advised him that a warrant should be sought only

with respect to the June 29 box, on the ground that probable cause existed only as to that box. Accordingly, Boyle's application was directed to the June 29 box. In his affidavit, Boyle stated that for several weeks he had been investigating possible mail fraud violations by employees at Saks; that during this period a Saks security employee had observed brown cardboard boxes addressed by hand and lacking the customary invoices and documents being prepared for mailing; and that several of these boxes had been opened and were found to contain clothes, cosmetics, and other Saks merchandise. In addition, the affidavit stated that a brown cardboard box addressed to petitioner Barbara Liberti had been delivered to her on June 29 and that the contents had been examined prior to mailing and consisted of Estee Lauder gift boxes belonging to Saks. Based on this information, the magistrate issued a warrant authorizing a search of the Liberti residence and the seizure of "one (1) brown cardboard box addressed to Mrs. Barbara Liberti, containing Estee Lauder cosmetic gift boxes, which are believed to constitute evidence of violation of Title 18, United States Code, Section 1341."

Although Boyle did not know what property would be found in the Liberti residence, he "believed" or "assumed" that Saks merchandise other than that contained in the June 29 box might be found. Boyle did not participate in the search of the Libertis' house. The warrant was executed by three postal inspectors, accompanied by a security manager from Saks who was present to identify Saks merchandise.

Boyle instructed the inspector in charge of the search that he could seize any items belonging to Saks that were not properly on the premises until he found the goods covered by the warrant, at which time the search was to cease.[1]

At the Liberti residence the inspectors gave Mrs. Liberti a copy of the warrant and told her that they were looking for a brown box containing Estee Lauder cosmetics. Mrs. Liberti led the inspectors to a hall closet, opened the door and said, "This is all I have." The inspectors observed boxes of cosmetics stacked on both the shelf and the floor of the closet. The Saks security manager confirmed that these were Saks items, and they were seized by the inspectors. However, the brown box identified in the warrant was not in the closet.

In response to the inspectors' request, Mrs. Liberti directed them to the basement. As the inspectors descended the stairs leading to the basement, they saw under the open stairway a quantity of boxes and shopping bags containing additional cosmetics. After the security officer confirmed that this was also Saks merchandise, it too was seized.[2] The June 29 box was never found.

---

[1] Although one of the three inspectors apparently did not understand the limited scope of the search, that inspector did not discover or seize any of the evidence that petitioners moved to suppress.

[2] The inspectors also found a blue nylon bag and a brown tote bag, both identified as Saks merchandise, in a bedroom closet. On appeal the government did not contest the suppression of these two items.

ARGUMENT

Petitioners contend (Pet. 27-42) that the merchandise seized in plain view from their residence by the postal inspectors should have been suppressed because its discovery was not "inadvertent" within the meaning of the plurality opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971).

1. Consideration of the instant case by this Court would be premature, since criminal charges are currently pending against petitioner Vincent Liberti in the district court. The ruling of the court of appeals thus places petitioner in the same position he would have occupied if the district court had denied the motion to suppress in the first instance. Such a denial would not have been subject to pretrial appeal. *DiBella* v. *United States*, 369 U.S. 121 (1962). The same considerations that counsel against interlocutory appeals of denials of suppression motions weigh against interlocutory review of the suppression issue by this Court. See *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967). At trial petitioner may be acquitted, in which event his claim will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present all his contentions to this Court by seeking review of the final judgment.[3]

[3] Since petitioner Barbara Liberti has not been charged with any criminal offense, her only interest is in the return of the property, not its suppression from evidence at trial. See Fed. R. Crim. P. 41(e). The district court, however, denied the motion for return of the property after finding that "[t]he evidence presented at the hearing tended to show that the seized property may have been the fruit of an illegal scheme" (Pet. App. 34a). Petitioners never appealed that aspect of the court's order. Accordingly, the question of the validity of the search and seizure is moot as to Mrs. Liberti, since she would not be entitled to any relief even if she prevailed in this litigation. See *United States Parole Commission* v. *Geraghty*, No. 78-572 (Mar. 19, 1980), slip op. 7-8.

2. On the merits, the court of appeals was correct in rejecting petitioners' Rule 41 motion. In *Coolidge* v. *New Hampshire*, *supra*, a plurality of this Court concluded that in order for property to be subject to seizure under the "plain view" doctrine, its discovery must be "inadvertent." The plurality explained (403 U.S. at 470-471):

> [A] plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

As the court of appeals observed (Pet. App. 46a), most courts have accepted this portion of the plurality opinion as established law. Whatever the status of the "inadvertency" doctrine, however, it has no bearing on the instant case, since the discovery of the mer-

chandise by the postal inspectors was "inadvertent" within the meaning of *Coolidge*.[4]

The creation of the "inadvertency" standard in *Coolidge* was premised on the necessity of obtaining a warrant "where the police know in advance the location of the evidence and intend to seize it * * *." 403 U.S. at 470. Since a warrant cannot be issued without probable cause, in order for the government to be charged with advance knowledge it must at the least have had information amounting to probable cause to believe that the property seized in plain view would be found on the premises to be searched. See *United States* v. *Hare*, 589 F.2d 1291, 1293-1296 (6th Cir. 1979). No such probable cause existed here. Although an employee in the Saks mailroom told Boyle that he had mailed several parcels to petitioners' residence during the preceding year, he could fix no specific dates for the mailings, and he had no knowledge of the contents of the packages. Indeed, other employees could state only that parcels "may have been mailed" to petitioners' address. The only package other than the one the inspectors obtained authorization to seize that was specifically identified as having been mailed to petitioners went through the mail room on June 23. But the contents of this box were unknown, and postal authorities were un-

[4] It is our view that the inadvertency requirement is not sound and should not be adopted by this Court. In a suitable case, where the outcome depended upon the validity of the doctrine, we would favor review of the question by the Court. This, however, is not such a case.

able to determine whether it had been delivered. Moreover, this information had become somewhat stale by July 10, the date of the warrant application. Thus, while the postal inspectors may have suspected that they would find other stolen merchandise in petitioners' home, they obviously did not "know" or have probable cause to believe that they would find it. Their seizure of the merchandise was therefore valid under the "plain view" doctrine.[5]

Petitioners argue (Pet. 15-26, 38-42) that the government may not claim that it lacked probable cause to obtain a warrant to seize the additional merchandise, because it presented no information to the magistrate upon which he could make that determination. But as the court of appeals correctly stated in laying that argument to rest (Pet. App. 49a),

> Where, as here, the police "know" or "have probable cause to believe" with respect to one shipment only, a requirement that they tender all evidence and information in their possession concerning possible other shipments is both impractical and unnecessary. A magistrate is not going to give them more searching authority

[5] In any event, the *Coolidge* plurality concluded that the "inadvertence" requirement does not bar the seizure of stolen goods or contraband that a defendant is not lawfully entitled to possess. 403 U.S. at 471. See *United States* v. *Cutts*, 535 F.2d 1083, 1084 (8th Cir. 1976). As Judge Newman, concurring below, observed (Pet. App. 50a), the goods at issue here were stolen, and that in itself provided sufficient reason to reverse the suppression order.

than they seek, and wise police will not ask for more than that to which they are entitled. If the district court is suggesting that the police must request unlimited search and seizure in every case, even though they do not believe it is justified, we find the suggestion to be without merit.

Since the warrant was limited to the items of cosmetics delivered on June 29, the permissible scope of search was correspondingly limited, and the warrant could not serve as a basis for a general search for other stolen goods suspected to be on the premises. Inspector Boyle so instructed the agents executing the warrant, and there is no evidence that the seizures that occurred were otherwise than in the course of due execution of the warrant.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

JOEL M. GERSHOWITZ
Attorney

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